

**SABA Islamic Media Sdn Bhd v
Negin Co Sdn Bhd & Anor**

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HIGH COURT (KUALA LUMPUR) — SUIT NO D7–22–1095 OF 2004
T SELVENTHIRANATHAN J
16 AUGUST 2005

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Civil Procedure — Injunction — Interlocutory injunction, application for — Restraining defendant from granting rights of reproduction and distribution to third party — Whether privity of contract between plaintiff and defendant which justify grant of injunction — Balance of convenience test — Real prospect of succeeding in claim against defendant considered

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The first and second defendants had agreed via a *musharakah* agreement on 5 June 2003 to a partnership project relating to a video. Clause 8(iii) of the *musharakah* agreement provided that the appointment of any third party contractors must be mutually agreed by both parties. Unknown to the second defendant, the first defendant had appointed the plaintiff as the sole and exclusive holder of the reproduction and distribution rights to the video under a reproduction and distribution agreement ('the RDA') on 27 February 2004. On 16 June 2004, the first defendant terminated the RDA with the plaintiff.

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The plaintiff applied for an interlocutory injunction to restrain the defendants from granting any rights to any third party which would infringe upon or be otherwise inconsistent with the plaintiff's rights under the RDA until the trial of this action. However, prior to the hearing of the application, the plaintiff obtained judgment in default of appearance against the first defendant. Therefore, when application came up for hearing, the plaintiff withdrew the same against the first defendant and the hearing of application was proceeded with only against the second defendant.

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Held, dismissing the application:

- (1) The issue of whether the agreement was lawfully terminated only required determination as between the plaintiff and the first defendant. In these circumstances, there was no basis for the plaintiff to obtain an interlocutory injunction against the second defendant premised upon the RDA. There was no evidence either to indicate that the first defendant acted on behalf of or as an agent of the second defendant in entering into the agreement with the plaintiff (see para 7).
- (2) As there was no evidence that the second defendant had consented to the appointment of the plaintiff as the sole and exclusive holder of the rights under the RDA, the first defendant in purporting to so appoint the plaintiff was in breach of cl 8(iii) and the plaintiff was in no position to attribute such consent to the second defendant in order to maintain the validity of the agreement *vis-a-vis* the second defendant (see para 10).

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- A** (3) The plaintiff had failed to satisfy the court that it had ‘a real prospect’ of succeeding in its claim against the second defendant. Even if it did so satisfy, the plaintiff could be adequately compensated in damages for breaching the agreement (see para 11). Also to interrupt the second defendant in the conduct of the established enterprise pursuant to the
- B** *musharakah* agreement would cause much greater inconvenience to the second defendant than to the plaintiff (see para 13). In addition to this, as the first defendant had terminated the agreement, rightly or wrongly, and as the second defendant was never privy to that agreement, the plaintiff could only look for relief under that agreement *vis-a-vis* the first
- C** defendant and not the second defendant (see para 14). Thus, the strength of the second defendant’s case was not only disproportionate to, but indeed overwhelmed, the strength of the plaintiff’s case (see para 15).

[Bahasa Malaysia summary]

- D** Defendan-defendan pertama dan kedua bersetuju melalui satu perjanjian *musharakah* pada 5 Jun 2003 terhadap satu projek perkongsian berkenaan satu video. Klausula 8(iii) perjanjian *musharakah* memperuntukkan bahawa pelantikan mana-mana kontraktor pihak ketiga hendaklah dipersetujui bersama oleh kedua-dua pihak. Tanpa diketahui oleh defendan kedua, defendan pertama telah melantik plaintif sebagai pemegang tunggal dan eksklusif hak-hak penerbitan semula dan pengedaran video di bawah satu perjanjian penerbitan semula dan pengedaran (‘RDA’) pada 27 Februari 2004. Pada 16 Jun 2004, defendan pertama telah menamatkan RDA tersebut dengan plaintif.
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- F** Plaintif telah memohon untuk satu injunksi interlokutori bagi menghalang defendan-defendan daripada memberikan apa-apa hak kepada mana-mana pihak ketiga yang akan melanggar atau sebaliknya menjadikannya tidak konsisten dengan hak-hak plaintif di bawah RDA sehingga perbicaraan tindakan ini. Namun, sebelum perbicaraan permohonan tersebut, plaintif telah memperoleh
- G** penghakiman ingkar kehadiran terhadap defendan pertama. Oleh itu, apabila permohonan tersebut dikemukakan untuk perbicaraan, plaintif menarik balik permohonan terhadap defendan pertama dan perbicaraan permohonan diteruskan hanya terhadap defendan kedua.
- H** **Diputuskan**, menolak permohonan tersebut:
- (1) Persoalan tentang sama ada perjanjian tersebut telah ditamatkan dengan sah hanya memerlukan penentuan antara plaintif dan defendan pertama. Dalam keadaan sedemikian, tiada asas untuk plaintif memperoleh injunksi interlokutori terhadap defendan kedua berdasarkan RDA. Tiada
- I** keterangan juga untuk menunjukkan bahawa defendan pertama bertindak bagi pihak atau sebagai ejen defendan kedua dalam memasuki perjanjian dengan plaintif (lihat perenggan 7).

- (2) Memandangkan tiada keterangan bahawa defendan kedua bersetuju dengan pelantikan plaintif sebagai pemegang tunggal dan eksklusif hak-hak di bawah RDA, defendan pertama bagi maksud melantik plaintif telah melanggar kl 8(iii) dan plaintif bukan dalam kedudukan untuk memberikan persetujuan kepada defendan kedua bagi tujuan mengekalkan kesahan perjanjian tersebut *vis-a-vis* defendan kedua (lihat perenggan 10). **A**
- (3) Plaintif telah gagal untuk meyakinkan mahkamah bahawa ia mempunyai 'a real prospect' untuk berjaya dalam tuntutan terhadap defendan kedua. Jiak sekalipun plaintif dapat meyakinkan demikian, plaintif boleh diberikan pampasan secukupnya secara ganti rugi kerana melanggar perjanjian tersebut (lihat perenggan 11). Juga untuk mengganggu defendan kedua dalam pengendalian perusahaan yang telah bertapak menurut perjanjian *musharakah* akan mengakibatkan kesulitan yang lebih kepada defendan kedua daripada plaintif (lihat perenggan 13). Selain itu, memandangkan defendan pertama telah menamatkan perjanjian tersebut, secara betul atau salah, dan memandangkan defendan kedua bukan privi kepada perjanjian tersebut, plaintif hanya boleh mendapat relief di bawah perjanjian *vis-a-vis* defendan pertama dan bukan defendan kedua (lihat perenggan 14). Oleh itu, kekuatan kes defendan kedua bukan sahaja tidak seimbang berbanding dengan, tetapi mengalahkan, kekuatan kes plaintif (lihat perenggan 15).] **B**
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Notes

For cases on application for interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3052–3054.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)

SG Lingam (Aziz Hassan & Co) for the plaintiff.

Robaimi bte Ali (Mohamad Amrul bin Jamaludin with her) (Azlan Shah Shaikh & Rashidi) for the second defendant.

T Selventhiranathan J:

- [1] Enclosure 3 was a summons in chambers taken out by the plaintiff for an interlocutory injunction to restrain both the defendants from granting any rights to any third party which would infringe upon or be otherwise inconsistent with the plaintiff's rights under an agreement styled as the 'Reproduction & Distribution Agreement' ('the agreement') entered into between the first defendant and the plaintiff on the 27 February 2004, until the trial of this action. By the same enclosure, the plaintiff also sought to restrain the defendants from marketing and/or distributing the Bahasa Malaysia VCD/DVD version **H**
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A of an animated cartoon film entitled ‘Muhammad Utusan Terakhir’, or in English ‘Muhammad The Last Prophet’ (‘the video’) which would similarly infringe upon or be otherwise inconsistent with the plaintiff’s rights under the agreement.

B [2] While the second defendant entered appearance to this suit on the 17 September 2004, the first defendant did not do so, although it had been served with all cause papers.

C [3] It was the plaintiff’s case that it was appointed the sole and exclusive distributor of the video under the agreement. The video was produced by a company called Badr International Corporation of Saudi Arabia. The plaintiff claimed that it had the sole and exclusive right under the agreement to reproduce, market, supply and distribute the video within ‘the territory’, defined in the agreement to comprise Malaysia, Singapore and Brunei. The plaintiff contended that, contrary to this sole and exclusive right, the first defendant appointed the second defendant as a distributor of the video in the territory and thereby breached the agreement. (This contention appeared to be erroneous for reasons to be stated later in this judgment.) The plaintiff also contended that the first defendant’s termination of the agreement by a letter dated the 16 June 2004 was unlawful.

E [4] Enclosure 3 was then fixed for hearing based on outline written submissions which had been directed to be put in. However, prior to the hearing of encl 3, the plaintiff obtained judgment in default of appearance against the first defendant vide an application in encl 11. Therefore, when encl 3 came up for hearing, the plaintiff withdrew the same against the first defendant and the hearing of encl 3 was proceeded with only against the second defendant.

G [5] Based on the written outline submissions tendered on behalf of the plaintiff and the second defendant and the cause papers and the affidavits filed, I was of the view that encl 3 should be dismissed as against the second defendant. Basically, the plaintiff’s claim was for a declaration that the purported termination of the agreement by the first defendant was null and void and for the plaintiff to be confirmed as the sole and exclusive distributor of the video in the territory, and for other consequential reliefs.

H [6] My findings, in relation to the facts, in respect of encl 3 now follow.

I [7] The first defendant appointed the plaintiff as the sole and exclusive holder of the reproduction and distribution rights to the video under the agreement. However, the first defendant terminated the agreement by a letter dated the 16 June 2004 (see exh ‘HM-1’ in the second defendant’s affidavit in reply at encl 8). As such, the issue of whether the agreement was lawfully terminated only required determination as between the plaintiff and the first defendant. The plaintiff itself acknowledged that there was no privity of

contract (under the agreement) between itself and the second defendant in a letter dated the 26 May 2004 addressed to the solicitors for the second defendant (see para (iv) in exh 'SA-8' to the plaintiff's affidavit at encl 2). In these circumstances, there was no basis for the plaintiff to obtain an interlocutory injunction against the second defendant premised upon the agreement. There was no evidence either to indicate that the first defendant acted on behalf of or as an agent of the second defendant in entering into the agreement with the plaintiff.

[8] Further, the second defendant contended that via an appointment letter dated the 10 July 2003, the second defendant and the first defendant were jointly authorised and appointed as agents to release the video by its original owner, ie Badr International Corp (see exh 'HM-2' at encl 8), in the territory. In this context, the contention of the plaintiff that the second defendant was appointed as a distributor of the video in the territory by the first defendant was erroneous and not borne out by this documentary evidence, which supported the second defendant's contention.

[9] By a *musharakah* agreement dated the 5 June 2003 (as per exh 'HM-3' at encl 8) entered into between the second defendant and the first defendant, both parties agreed to a partnership project relating to the video, as described in the *musharakah* agreement, which was to be based on mutual profit-sharing and loss-sharing principles.

[10] Clause 8(iii) of the *musharakah* agreement provided that the 'appointment of any third party sub-contractors for this project must acquire mutual consent from both parties'. The second defendant contended that it never consented to the appointment of the plaintiff by the first defendant as the sole and exclusive holder of the rights under the agreement. As there was no evidence that the second defendant consented to such appointment of the plaintiff, the first defendant in purporting to so appoint the plaintiff was in breach of the said cl 8(iii) and the plaintiff was in no position to attribute such consent to the second defendant in order to maintain the validity of the agreement *vis-a-vis* the second defendant.

[11] Based on the above facts adduced by the second defendant, I was of the view that the plaintiff failed to satisfy the court that it had 'a real prospect' of succeeding in its claim against the second defendant. Even if it did so satisfy, of which I was not convinced, I was further of the view that the plaintiff could be adequately compensated in damages for breaching the agreement in consonance with the principles relating to the granting of interlocutory injunctions set out in the time-honoured authority of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

[12] In applying those principles to the facts of the present case, I bore in mind what Lord Diplock had to say at pp 407–409 in the report of that case, which was as follows:

- A** It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that
- B** 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing': *Wakefield v Duke of Buccleugh* (1865) 12 LT 628, at p 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a
- C** permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

- As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent
- D** injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. *If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.* If, on the
- E** other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would
- F** have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

- G** It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

- H** Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. *If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.*
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Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. *The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.* The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case. (Emphasis added.)

[13] Applying the approach espoused by Lord Diplock in *American Cyanamid* to the facts of the present case, I was of the considered view that to interrupt the second defendant in the conduct of the established enterprise pursuant to the *musharakah* agreement adverted to above would cause much greater inconvenience to the second defendant than to the plaintiff as the second defendant would have to start again to establish it, ie the established enterprise which would have been interrupted if the interlocutory injunction sought by the plaintiff was granted, in the event of the second defendant succeeding at the trial.

[14] In addition to this, as the first defendant had terminated the agreement, rightly or wrongly, and as the second defendant was never privy to that agreement, the plaintiff could only look for relief under that agreement *vis-a-vis* the first defendant and not the second defendant.

[15] I was therefore of the view that it was proper, in Lord Diplock's words, 'to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence on the hearing of the application' in encl 3 as it was apparent upon the facts disclosed by the evidence, as to which there was no credible dispute, that the strength of the second defendant's case was not only disproportionate to, but indeed overwhelmed, the strength of the plaintiff's case.

[16] Having all the above factors in mind, I dismissed the application for the interlocutory injunction in encl 3 by the plaintiff against the second defendant with costs.

Application dismissed with costs.

Reported by Loo Lai Mee

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